



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CORAM: F. AZANGALALA AND J.R. KARANJA JJ
CRIMINAL APPEAL NO. 50 OF 2008

BETWEEN
PHILIP AMAI NEMIA.....APPELLANT
AND
REPUBLIC.....RESPONDENT

*[Being an appeal from the Judgment of the Senior Resident Magistrate -
G. A. Mmasi, dated 15th July, 2008 – in Criminal Case No. 10014 of 2007
at Eldoret Chief Magistrate’s Court]*

JUDGMENT

The appellant **Philip Amai Nemia**, has lodged this appeal against his conviction and sentence by **G.A. Mmasi**, Senior Resident Magistrate sitting at Eldoret. He was originally charged with attempted robbery with violence contrary to section 297 (2) of the Penal Code , but convicted for robbery contrary to section 296(1) of the same code. The charge carried the following particulars: - against the appellant:-

“On the 30th day of October, 2007, at Nangili Girls Secondary School gate, Kongoni Location of Lugari District within Western Province, jointly with others not before the court while armed with dangerous weapons namely Smith and Wessons (guns) and other unknown types of rifles, attempted to rob Joseph Maingi of motor vehicle KAP 446 W Isuzu Canter and at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Joseph Maingi”

The prosecution led by Inspector **Ekisa** called a total of eight (8) witnesses in support of the case. The brief facts of the case were that on 30th October, 2007, at about 3.00 p.m., the complainant, (P.W.1), and his turn boy **Joseph Kimani**, (P.W.2) were leaving Nangili Girls Secondary School where they had delivered bread. They were in motor vehicle registration number KAP 446 W in the driver’s cabin. At the school gate, they were accosted by thugs from both sides of the vehicle. The thugs on the turn boy’s side removed him from the cabin and bundled him into the rear compartment of the vehicle. Some of the thugs were armed with guns. The thugs who went to the driver’s (complaint’s) side struggled with him and snatched the vehicle keys from him. As they did so, the rear door of the vehicle opened and P.W.2 jumped out and screamed which screams attracted school watchmen **Robert Wafula Masinde** (P.W.4), **Hudson Masiga** (P.W.5) and Policemen who were then on guard duties at the examinations which were being taken at the said school. The policemen included **P.C. Christopher Sikuku**, (P.W.8).

P.W.5 was the watchman who had opened the school gate for P.W.1 and P.W.2. He observed that as the pair were about to exit the gate, three people entered and locked the gate. Two of them went to the driver’s side and one to the passenger’s side. He saw P.W.2, being removed from the driver’s cabin and put at the rear of the vehicle. P.W.5 then alerted one of the police officers manning exams at the school. P.W.5 and the officer ran towards the vehicle. One of the thugs pointed a gun at P.W.5 and he fell down as the police officer shot in the air which shot attracted members of the public. The thugs scattered in different directions with members of the public, the police officers and the watchman in hot

pursuit. One thug was lynched by members of the public but the rest escaped.

The appellant was then on 6th November, 2007 arrested by P.C. **Daniel Kaiko**, (P.W.3).

C.IP **Ferdinand Nyongesa (P.W.7)**, conducted two identification parades at Lumakanda Police Station (26/11/2007) and at Nangili Patrol Base (27/11/2007). According to P.w.7, the complainant was unable to identify the appellant at the parade mounted at Lumakanda. At Nangili, however, P.W.7 testified that P.W.4 and P.W.5 identified the appellant.

P.W.8, testified that he came face to face with the appellant when he went to rescue the victims. According to him, the appellant was chasing P.W.2 after jumping from the motor vehicle.

At the close of the prosecution case, the Learned Senior Resident Magistrate determined that the appellant had a case to answer and placed him on his defence. He gave an unsworn defence in which he denied the charge, even though he was identified at an identification parade conducted at Nangili Patrol Base.

On 15th July, 2008, the Learned Senior Resident Magistrate delivered her judgment in which she convicted the appellant of simple robbery contrary to section 296(1) of the Penal Code and sentenced him to five (5) years imprisonment as already stated. The appellant being dissatisfied with both his conviction and sentence lodged this appeal. He has raised two grounds of appeal namely, that the investigating officer was not called to testify and that the complainant did not identify him yet the incident took place during the day.

At the hearing of the appeal, the appellant restated the said grounds of appeal and emphasized that the identification parade at which some witnesses identified him was not properly conducted. **Mr. Oluoch**, the Learned Senior Prosecution counsel, who appeared for the Respondent State, opposed the appeal contending that the offence was committed in broad daylight and that the appellant was positively identified.

In view of the fact that this is a first appeal, we have a duty to re-examine and re-evaluate the evidence which was adduced before the learned Senior resident Magistrate and arrive at our own independent conclusion of course bearing in mind that we did not see and hear the witnesses testify and should give allowance for that (See **Okeno –vrs Republic [1972] E.A. 32**).

Having considered the evidence, the grounds of appeal and the parties' submissions, it is our view that this appeal turns on whether the appellant was positively identified. The complainant did not identify the appellant at the identification parade mounted by P.W. 7. He however, purported to identify him in the dock at the trial. That identification was of course worthless. P.W.2 neither identified the appellant at the time of the attempted robbery nor at any identification parade.

We have the testimonies of P.W.4, P.W.5 and P.W.8. The first two were the day watchmen at Nangili Secondary School. They testified that they identified the appellant at the scene and at the subsequent identification parade mounted by P.W. 7. There is however conflict as to the number of members who constituted the parade. Although P.W.7 testified that he mounted a parade of 8 members, P.W.4 and P.W.5 testified that the parade comprised only five (5) members. They also told the court that the members were of different sizes. In view of their testimonies, we entertain doubt as to whether P.W.7 indeed properly conducted the identification parade. Their identification of the appellant therefore remained dock identification and is in the same category as that of P.W.1 and P.W.2

With regard to the identification by P.W.8, the same too was merely dock identification give the conflicting evidence on the number of members who comprised the parade. It is also significant that prior to the said parade, P.W.8 had not given a description of the appellant to P.W.7. Besides, he testified that the appellant came close to him and even knelt before him. Why did he not arrest him then? In the premises, we find that the evidence of identification relied upon by the Learned Senior Resident Magistrate was not water-tight and could not sustain the appellant's conviction.

The want of positive identification was compounded by the failure to call the investigating officer to testify. In our view, he was an essential witness because he could have buttressed the testimony of P.W.3, the arresting officer. The latter arrested the appellant on information he received that the appellant was called "**Philo**". None of the witnesses suggested that name to him nor had they described the appellant to him. The investigating officer could probably have completed the chain link leading to the arrest of the appellant.

In the end, this appeal succeeds. The appellant's conviction is hereby quashed and the sentence imposed is hereby set aside. The appellant should be set at liberty forthwith unless he is otherwise lawfully held.

DATED AND DELIVERD AT ELDORET THIS 7TH DAY OF SEPTEMBER, 2011.

F. AZANGALALA
JUDGE.

J.R. KARANJA
JUDGE.

Read in the presence of:-

- (1) Philip Amai Nemia, the appellant in person
- (2) Mr. Kabaka for the Republic **ANGALALA**
JUDGE.